OFFICE OF MILITARY GOVERNMENT FOR GERMANY (U.S.)
ECONOMICS DIVISION
Decartelization Branch

Ex. 31-D

22 September 1947

MEMORANDUM

TO : Mr. Johnston Avery

SUBJECT: Clarification of Policy Statement

1. Reference is made to your memorandum to me dated 19 September 1947. I am very happy to do my best to clarify the principle proposed in my memorandum to Mr. Hawkins under date of 18 September 1947 and designated as "Policy Alternative No. 1." Your statement of the principle ("the new policy which says we will not cut below the point of technological efficiency") is scarcely adequate. My statement of it with the essential qualifications reads as follows:

"Policy Alternative No. 1

"It is the policy of the Decartelization Branch, when dealing with firms operating under conditions of oligopoly (a small number of firms producing the entire output), that, as a general rule, we should deconcentrate to (but not below) the point where the Germans concerned can convince us that if we go further, technological efficiency will be seriously impaired."

2. Notice that as the first qualification the principle applies only where there are already several firms competing in the field. Second, that it applies only as a general rule. Thirdly and most important, the test is not the "point" of technological efficiency, but rather it is the point where we believe technological efficiency would be seriously impaired. Fourth, that we are not concerned about some impairment of technological efficiency (which is likely to be alleged against every deconcentration action we ever take), but only with what we believe would be a serious impairment of technological efficiency.

3. With respect to the specific questions raised in your memorandum of 19 September,

a. The word "us" answers the first question as to who makes the determination.

b. Moreover, what has to be determined is not the point where technological efficiency begins to suffer seriously but the point where we become "convinced" of this.

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c. The question on profits is answered in the term "technological efficiency." This term was used advisedly in its broad popular sense to refer to those industrial techniques and relationships which are among the determining factors in high or low per-unit cost of production. It could be described as efficient production in the industrial sense as contrasted with the monetary sense.[1] The principle as stated, therefore, rules out entirely any other tests of efficiency such as profits.

d. The problem raised in connection with the level of industry can be taken care of by the phrase "as a general rule." Clearly an exception to the rule should be made, and we should not hesitate in prescribing a deconcentration plan which may incidentally operate to reduce a productive capacity which, because of the level of industry plan, can have no reason for existing. We cannot be asked to assume responsibility for a reduction of technological efficiency caused by the level of industry.

4. I do not accept as valid Mr. Coleman's view that nothing we might do by way of deconcentration will impair technological efficiency, because all we are doing is changing ownership patterns, leaving every machine right where it was before and capable of doing everything it was capable of doing before. I do not accept such a restricted definition of technological efficiency as that implies, and it is used in a much broader sense in the principle we are discussing. Interpreted so narrowly, it would mean next to nothing. I cannot argue this proposition here. I will only say that I know of no economist or engineer who would accept it, I don't think either German or American public opinion would accept it, nor do I believe our Board of Review will accept it. Sometimes the complete reverse of that argument is advanced. It is said (quite rightly) that we have a mandate to eliminate excessive concentration of economic power. If we accept the principle under discussion, what could we do in case such a concentration couldn't be eliminated without serious impairment of technological efficiency? The answer is, of course, that in such a case we would have to depart from the "general rule."

5. In the first paragraph of your memorandum, you quite rightly suggest that even competent industrial engineers would have difficulty in determining "where the line of technological efficiency" is and then they would be likely to disagree. I do not believe that it follows, however,

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1/ Under conditions of lively competition, these could be quite different in the short run, but in the long run they would tend to be much the same. However, under conditions of monopoly or imperfect competition (with which the principle deals), they could be quite different for very, very long periods.

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that we should not use the concept. I think it is a very powerful concept and that it does have meaning and content. I believe it has at least as much meaning as "due process of law" or "affected with a public interest." What those terms mean depends on who is speaking, the late Mr. Justice Butler or the late Mr. Justice Holmes. They, too, are powerful concepts because the answer to the question of who is to be the beneficiary of billions of dollars worth of property depends on what those two phrases mean.

6. I do not believe that we can successfully deal with the issue with which this principle is concerned simply by refusing to establish a policy on it. I think critics of our deconcentration program in German public life, in the higher levels of OMGUS and in the United States, are certain to raise the issue repeatedly. If we wish to forestall or answer this criticism, I sincerely feel that we had better have a defensible policy on the issue and publicize it widely. If we either cannot or will not do this, then we should certainly quit talking about winning mass support for our program from the people of Germany, popularizing our program with our U.S. and Allied colleagues, or getting the backing of the German public and press for it. How to achieve these things keeps coming up constantly in our discussions around the shop and I have supposed the idea was to be taken seriously.

7. Wholly apart from the publicity consideration, however, there are other reasons why we should establish such policy. While in the U.S., the Antitrust Division's work is largely legal, the situation is different here. It seems to me that in our deconcentration program here we are dealing with an economic problem perhaps even more than with a legal problem I believe that to direct a Team to draft a deconcentration plan without giving it a clear-cut policy directive on this issue would be very much like telling a public utilities commission just to go ahead and raise and lower electric rates as reasonable men. Immediately, before it made a move, it would ask, "On what principle?" Few people would contend that nothing is gained when we give them the answer, "On the principle that the company must be permitted to earn a fair return on fair value," simply because nobody knows what fair value is, and because ten competent industrial engineers might give you ten different answers. (This, of course, has actually happened repeatedly.)

8. I believe it is a mistake to confuse a principle with a formula. Since Smith vs. Ames in 1898, the U.S. Supreme Court has stood pat on the principle just quoted above. But that same Court has, since the Minnesota Rate Case in 1913, steadfastly refused to sanction the use of any mathematical or engineering formula for determining "fair value." I would be the last man to suggest that we seek a magic formula for determining where technological efficiency begins and ends, because there isn't any. But I feel that it would be a grave error to attempt to attack economic problems without laying down some economic principles on the basis of which we are going

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to attack them and I do not believe that it is enough just to say we don't need any principles, we'll just be reasonable. Nor can I share your fear that by talking "in terms of technological efficiency, we merely pass into the hands of others a very convenient club with which they can beat us over the head on all occasions." We did not invent that phrase and those "others" have had that club well polished for a long time. I am afraid that for us not to have a defensible policy with which to deal with it is only to bow our heads and wait for the blows to start falling.

CHARLES A. DILLEY
Assistant Chief of Branch
for Deconcentration

CC w/1 Attach.
Cy Mr. Avery's memo, 19 Sep 47

Mr. Hawkins
Mr. Barron
Mr. Coleman
Mr. Collison
Mr. Bartels
Mr. Gaberman
Mr. Helfrich
Mr. Kirby

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